operators to bundle rates for equipment and installations while keeping them separate from cable service, and the regulation of rates for additional outlets.

Evaluating the pricing of cable equipment "on the basis of actual cost" does not literally mean "at actual cost." Congress specifically provided for cable operators to earn a reasonable profit. Congress also specified that, in providing for the regulation of rates for the installation and lease of the equipment necessary for subscribers to receive basic service, "[t]he term 'actual cost' is intended to include such normal business costs as depreciation and service."[71] Accordingly, rates for the installation and lease of basic equipment must account for the following: installation, amortization, maintenance, financing, general administrative overhead, plus a reasonable profit. These are the basic costs associated with providing basic equipment and AOs, and thus were fully intended by Congress to be included in the basic equipment rate.

The Commission "tentatively conclude[s] that Congress intended to separate rates for equipment and installations from other basic tier rates."[72] While the separate tests established for the service and equipment components of basic service might suggest an effort to unbundle service from equipment, neither the 1992 Cable Act nor its legislative history, however, evidence an intent to prohibit "bundling" in any form of various equipment

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[71]House Report at 83; <u>see also</u>, NPRM at n.66, 79.

[72]NPRM at ¶63.

components. Thus, for example, the FCC should not prohibit a bundled rate for converters and remotes provided to subscribers. These two pieces of equipment are really part of one functional unit. The converter receives the signals from the cable system and delivers them to the television set, while the remote permits the subscriber to access the television set to select among such signals. The remote sends an infrared signal which must be received and processed by the converter. One piece will not work without the other. Moreover, viewed separately, the price for remotes might be relatively low (e.g., \$15-\$25), while the converter price can be relatively high (e.g., \$110-\$150). The only sensible way to account for both the wide price difference between converters and remotes, and the fact that they form a single functional equipment unit is to permit bundling of the equipment rate.

Installation is another area where the NPRM raises several important issues. The Commission recognizes in the NPRM that "[m]any operators charge less than actual costs for service installation as part of their marketing efforts."[73] In fact, this is almost always the case. Similarly, cable operators commonly price subsequent service calls well below cost, or even free. It would contravene Congressional intent to preclude this flexibility for cable operators, which, as the NPRM recognizes, can result in increased cable penetration.[74] Such flexibility,

[73] Id. at ¶70.

[74] Id.

therefore, should continue to include the unrestricted ability of cable operators to offer promotional discounts on installations as a mechanism to increase subscribership.

Accordingly, cable operators should be allowed to establish hourly installation rates to account for unique circumstances, including local labor costs, etc., which can vary widely. In the NPRM, "[t]he Commission recognizes that costs for installation will vary depending on whether the dwelling has inside cabling already. It may thus be more reasonable to require two installation rates, one for previously wired dwellings and one rate for inside cabling."[75] Installation rates should be subject to a reasonableness standard, whereby the rate would be deemed reasonable if no greater than, for example, the hourly installation rate charged by the local exchange telephone carrier ("telco") that provides service in the area. Such a standard should provide an adequate check against unreasonable installation rates, given that telephone installations require comparable trucks, equipment, skill levels, etc.

The NPRM also asks whether there should be a surcharge over the normal installation rate when the distance between a customer's premises and the operator's distribution plant is substantial.[76] Such situations are encountered frequently in the cable industry and fall into two general categories. One general category arises in situations where the cable operator's

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[75]<u>Id</u>. at ¶69 (footnote omitted).

[76]<u>Id</u>. at ¶69.

activated plant does not "pass" one or more homes within the franchise territory. Such situations are typically dealt with through a "line extension policy" whereby such subscribers might be required to advance a grant in aid of construction before service is provided. The other general category arises where the cable plant passes a given home, but the home is set back an abnormal distance from the street. In such cases, a "non-standard" installation rate is typically assessed over and above the standard fee. The use of a reasonableness standard, as suggested above, would resolve the "non-standard" installation problem. But there is no reason why cable operators should not continue to be allowed to follow written line extension or non-standard installation policies, particularly if set forth in the franchise contract. Such an approach would be consistent with the "grandfathering" concept embodied in Section 623(j).

The NPRM correctly recognizes that Congress intended to treat additional outlets the same as other equipment, "conclud[ing] that cable operators should use the same cost methodology they use for installation of other equipment to calculate the rates for installation of connections for additional receivers."[77] Installation and maintenance of AOs is essentially similar to installation and maintenance of the initial subscriber drop, but it requires additional equipment and labor to connect AOs once the initial connection to the home is made. Accordingly, installation and maintenance of AOs should be

[77]Id. at ¶71 (footnote omitted).

regulated the same as the initial drop, as discussed above. Thus, the cable operator should be allowed to establish a reasonable hourly rate, and promotional discounts should be permitted.

Section 623(b)(3) of the 1992 Cable Act only addresses the equipment component of AOs (i.e., installation and monthly maintenance). This subsection does not address the service component of AOs, which comprises a much greater portion of costs. Thus, in addition to the proper standard for scrutinizing installation and monthly maintenance of AO equipment, the Commission needs to address the appropriate standard for the service aspect of AOs.

The service component of AOs, however, is governed by Sections 623(b)(1) and (2) of the 1992 Cable Act regarding rate regulation of cable service generally. As discussed above, the type of regulation of the AO service component would depend on the level of service being provided to the particular AO. Such service level could, of course, vary even within a single home, where it is not uncommon, for example, to have the initial drop in the living room receive a full array of tiered service, but the AOs in the bedrooms receive only basic service. Moreover, depending on the level of service provided, each AO is just as valuable as the first set, two residents of the same household can view different programming simultaneously. Thus, a cable AO is far different from an extension telephone, which only allows one conversation (unless the telephone subscriber pays for additional lines). Accordingly, the rate for AO of basic service should be deemed reasonable so long as it does not exceed the monthly charge allowed for basic service to the first set.

The NPRM concludes that it was Congress' intent to unbundle basic service from basic equipment.[78] However, the Commission takes this intent a step further, "tentatively conclud[ing] that, to be consistent with the statute's intent, the rates for installation should not be bundled with rates for the lease of equipment."[79] There is no Congressional intent, however, to prohibit such bundling. Indeed, the 1992 Cable Act deals with the installation and lease of equipment used to receive basic service in the same provision.[80] The Commission simply states "that this unbundling could help to establish an environment in which a competitive market for equipment and installation may develop."[81] There is no evidence, however, that a competitive market for equipment and installation would be hindered by permitting cable operators to bundle equipment and installation rates. A thriving market for many different types of equipment, including A/B switches and remote control units, already exists. There is no reason to believe that such a market, including installation, will not continue to develop.

Even if "bundling" of basic service and basic equipment were prohibited, the Commission should, at the very least, allow cable

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[78] Id. at ¶63.

[79] Id.

[80] 47 U.S.C. §543(b)(3).

[81] NPRM at ¶63.

operators to establish their own rates for basic equipment, installation, service calls, and AOs, so long as such rates remain within a reasonable rate "basket. In applying a "basket" analysis, all basic equipment rates would be deemed reasonable so long as aggregate basic equipment revenues do not exceed the cable operator's basic equipment revenue for the year. Such an approach would allow the great majority of cable operators, who charge less than cost for installations and service calls, to recover those costs as part of the monthly rates for converters, remotes, or AOs. Consumers certainly would not be disadvantaged regardless of a change in allocation of costs among various elements of the bill. Moreover, a basket approach for equipment actually benefits consumers, since it does not foreclose cable service to members of the public who might decline service if each component of equipment, including installation, had to be priced at cost.

If the Commission fails to employ a "basket" analysis of overall basic equipment revenues, cable operators could suffer significant declines in cash flow, which in turn, could adversely affect their ability to continue to invest in improved programming, better customer service, and advanced technology. Thus, for example, if a cable operator's basic equipment rates are forced down to meet the Commission's benchmark, at a very minimum the operator ought to be able to recover lost revenues through the ability to raise other rates which may be below the applicable benchmark.

E. Costs of Franchise Requirements and Subscriber Bill Itemization.

Section 623(b)(2) of the 1992 Cable Act expressly requires that the Commission's basic rate formula, among other things, must account for costs related to PEG access channels, other franchise obligations, franchise fees, and the direct costs of basic level programming (including, for example, retransmission consent payments). Section 622(c) of the 1992 Cable Act expressly authorizes cable operators to itemize on subscriber bills (1) the amount assessed as a franchise fee (and the identity of the franchising authority), (2) the amount assessed to satisfy any mandated PEG access requirements, and (3) "any other fee, tax, assessment, or charge of any kind imposed by any governmental authority on the transaction between the operator and the subscriber." In order to implement these related provisions, the Commission seeks comment on the interrelationship between the two .[82]

Although there is very little legislative history regarding these provisions, we believe there are two fundamental reasons why Congress provided for such itemization: (1) to ensure that cable operators are not prejudiced under any benchmark approach by costs that directly result from governmental cost increases, and (2) to facilitate the scrutiny of complete cable rate information by subscribers so that the subscribers can make informed decisions regarding cable rates and government taxes and levies.

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[82]NPRM at ¶175.

One beneficial result of itemizing the foregoing cost categories is that they would not have to be included in determining benchmark rates, thereby promoting the goal of reducing the burdens on franchising authorities, cable operators and the Commission.[83] Thus, the most efficient way for the Commission to implement Sections 622(c) and 623 in a consistent manner is to allow all of the foregoing costs to be itemized as separate charges over and above the basic rate authorized by the Commission's benchmarks. Take, for example, two cable operators having systems of similar size, age, location, and configuration. Their net basic service rates (excluding franchise and government related costs) might well be the same applying the applicable benchmarks to be devised by the Commission. However, assume one cable system pays a five percent franchise fee and additional government imposed costs while the other system pays considerably less. Obviously, these two systems should not be grouped together for purposes of establishing benchmark rates, unless only rates net of (i.e., excluding) such government costs are compared.

Similarly, take two cable communities served by the same headend, but whose franchising authorities impose differing assessments. Even without regard to whether the 1992 Cable Act's requirement of uniform rates might be applied on a system-wide as opposed to a franchise area basis,[84] the cable operator

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[83] See 47 U.S.C. §543(b)(2)(A).

[84] Id. at §543(d).

nevertheless has incentives (including administrative ease in billing and marketing, etc.) to charge the same net rate to all of the system's subscribers. However, it is unfair to certain subscribers to require the same gross amount to be charged in each franchise area throughout the system. The result of such a requirement would be that subscribers in communities with lower government costs would be subsidizing those subscribers in communities with higher government costs. If such costs are itemized and removed from the benchmark analysis, however, the cable operator would be able to charge the same net rate throughout the system, each community could judge the rate for purposes of meeting the basic rate benchmark, and subscribers with higher total bills would now know that government assessments on the cable operator account for the difference.

Once the costs and assessments to be itemized are identified, they must be "reasonably and properly" allocated among the various levels of service.[85] Franchise fees are readily allocable, since they are calculated as a percentage of revenue. Thus, a larger amount will automatically be allocated to expanded tier customers than to basic-only customers. However, since the basic service level must include both PEG access channels and stations for which any retransmission fees might have to be paid, the proportionate amount of these charges should be added to the bill of every subscriber since all subscribers receive basic.

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[85] Id. at § 543(b)(2)(C)(v).

Although the 1992 Cable Act requires the Commission to identify certain cable operator costs to be itemized, the Commission's proposed cost allocation and uniform accounting standards to identify costs and revenues[86] are far too complex and burdensome. Accordingly, such proposed rules would frustrate the 1992 Cable Act's directive to reduce administrative burdens on the concerned parties, including the Commission. Instead, the Commission should rely on the assumption of good faith allocation by cable operators, consistent with generally accepted accounting principles. As a further safeguard, the Commission could impose accounting procedures on cable operators found to have intentionally imposed improper pass-throughs.

The Commission must also make clear that identification of these items on the subscriber bill in the form of a "separate line item" is authorized by the express language of the 1992 Cable Act. The ability to disclose by line item means a separate line for each relevant government cost immediately below the cable operator's net service rate.

Full itemization of the costs described above could provide incentives for franchising authorities to refrain from imposing unreasonable or excessive assessments upon prospective new cable operators or incumbent cable operators seeking franchise renewals. It is important that government officials understand that higher costs and assessments will not go unnoticed. It would be very difficult to achieve Congress' goal of "reasonable"

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[86]NPRM at Appendix A.

basic cable rates if local governments, whose assessments upon cable operators make up a sizeable portion of such rates, can maintain the status quo by preventing full disclosure of new or higher charges. The most effective check on local governments is public scrutiny. The most efficient way to provide such information to the public is by allowing cable operators to clearly itemize such assessments directly on the bills sent to cable subscribers, as Congress has obviously intended to authorize.

F. Implementation and Enforcement

The Commission seeks comment on the procedures and standards to be adopted for the purpose of implementing and enforcing basic cable service rate regulation.[87] According to Section 623(b)(5)(A), cable operators have been designated to "implement," and franchising authorities to "enforce" rate regulations established by the Commission. Under this scheme, cable operators propose to their franchising authorities basic service rate increases that they believe are consistent with the Commission's standards.

Falcon believes that a basic rate increase proposal can be implemented immediately after appropriate notice, such as 30 days, to the franchising authority and, if required by the franchise, to the subscribers. A rule that would permit the franchising authority to defer implementation of a proposed basic rate increase based on compliance with information requests, such

[87]See NPRM at ¶¶79-89.

as those suggested in paragraphs 83 and 85 of the NPRM, could result in an endless demand for information by that franchising authority. In situations where the franchising authority believes the proposed basic rate increase is outside the Commission's benchmark, the franchising authority is statutorily authorized to "enforce" the regulations prescribed by the Commission.[88] This enforcement power acts as a check on the cable operator's implementation of basic service rate increases without the inefficiency of a scheme permitting perpetual information requests before a cable operator's proposed basic rate increase is approved.

The Commission has offered alternative approaches to resolving disputes arising from local authorities' decisions regarding rate regulation.[89] Falcon believes that any such disputes should be resolved by the Commission, rather than the courts. Falcon agrees with the Commission's analysis that resolution by the Commission "might assure a more uniform interpretation of the standards and procedures adopted pursuant to the [1992] Cable Act."[90] Uniform interpretation of rate regulation disputes by one body will provide better guidance than conflicting decisions made by many different courts applying different states' laws. Decisions made by the Commission will also provide immediate precedent for similar issues. Finally,

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[88]47 U.S.C. §543(b)(5)(A).

[89]<u>See</u> NPRM at ¶87.

[90]<u>Id</u>.

resolution by the Commission will be more expedient and, therefore, is in accordance with Congress' intent, as stated in the plain language of the statute.[91]

In enforcing the new rate regulation provisions, Congress specifically did not include a provision allowing refunds where an increase in basic cable service rates is ultimately determined to be unreasonable.[92] Thus, the determination that basic service rates that have already gone into effect are, in fact, unreasonable, must be applied prospectively only. Accordingly, the Commission should not adopt the alternative it proposed in paragraph 83 of the NPRM, wherein rate increases could go into effect automatically after the expiration of the 30-day notice period "subject to refund if the franchising authority ultimately determines the increase to be unjustified."[93]

If a franchising authority finds a proposed increase in basic service rate to be unreasonable, the cable operator should

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[91]See 47 U.S.C. §543(b)(5)(B) (regulations prescribed by the Commission under this subsection shall include "procedures for the expeditious resolution of disputes between cable operators and franchising authorities concerning the administration of such regulations").

[92]Cf. 47 U.S.C. §543(c)(1)(C) (fact that Congress specifically provided for refunds of unreasonable cable programming services rates demonstrates that Congress was aware of refunding option, and knew how to draft provisions allowing refunds, but chose not to do so with respect to basic service).

[93]In this regard we note that there is no refund authority for basic service rates in the statute, which is in contrast to the refund authority for cable service rates. See 47 U.S.C. §543(c)(1)(C). See also 138 Cong. Rec. S654 (January 30, 1992) (colloquy between Senators Inouye and Metzenbaum).

be able to exercise discretion in making the rate reasonable.[94] For example, the cable operator should be given a reasonable amount of time to reduce the basic service rate, or add sufficient services to the basic service tier, to meet the applicable per-channel benchmark. Thus, if the operator elects a rate reduction, this could be implemented within 30 days. On the other hand, if the operator elects an increase in programming service, this decision could be conveyed to the franchising authority within 30 days, but might require some additional time to implement due to issues such as programming contracts, technical reconfiguration, marketing materials, etc.

As a final matter, which relates not only to enforcement of basic service rate regulation but also to the regulation of other cable services and equipment, Falcon cautions the Commission to avoid regulation which could be deemed confiscatory. The Commission has recognized the potential for implementing rate regulations that result in unconstitutional takings under the Fifth Amendment,[95] and must take care to assure that no part of its rate regulations can be struck down as unconstitutional under existing Fifth Amendment law. The Supreme Court has stated that "[a]ll that is protected against, in a constitutional sense, is that the rates fixed by [a] Commission be higher than a

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[94] See NPRM at ¶86 (unless absolutely necessary, the franchising authority should not be able to set a rate for basic cable service itself; rather, as suggested herein, the cable operator should be given the opportunity to adjust either the rate or the services to fall within the Commission's bounds of "reasonableness").

[95] See NPRM at n.66.

confiscatory level."[96] A confiscatory level is one where "an unreasonable balance has been struck in the regulation process so as unreasonably to favor ratepayer interests at the substantial expense of investor interests."[97] Conversely, regulated rates are not confiscatory when they are "just and reasonable," providing for recovery of costs and a fair return on investment.[98]

In the present context, concern over confiscatory rates could arise in situations where cable operators are required to issue refunds or roll back rates to meet the Commission's new regulatory benchmark. If the cable operator has to refund or roll back an amount that does not allow him to cover his costs and provide him a fair return on his investment, then that regulation is confiscatory, and results in a Fifth Amendment taking.[99] Thus, the Commission must consider the impact of regulation on the cable operator's return on investment, and adopt rules that do not result in confiscatory rates.

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[96]Federal Power Comm'n v. Texaco Inc., 417 U.S. 380, 391-92 (1974).

[97]Jersey Central Power & Light Co. v. F.E.R.C., 810 F.2d 1168, 1189 (D.C. Cir. 1987) (Starr, J., concurring); see also id. at 1177-78; Duquesne Light Co. v. Barasch, 488 U.S. 299, 308 (1989).

[98]See Duquesne Light Co., 488 U.S. at 307-08; Tenoco Oil Co. v. Dep't of Consumer Affairs, 876 F.2d 1013, 1020 (1st Cir. 1989).

[99]See Matson Navigation Co. v. Federal Maritime Comm'n, 959 F.2d 1039, 1051 (D.C. Cir. 1992) (Confiscatory rates are in violation of the Fifth Amendment, which serves as a constitutional check on rate regulation by acting as an absolute floor, below which rates cannot be set).

III. CABLE PROGRAMMING SERVICE REGULATION.

A. Non-Basic Rate Formula Must be Flexible.

The FCC has requested comment on whether it should apply the same standard of reasonableness with respect to the regulation of non-basic service tier rates as it ultimately adopts with respect to the regulation of the basic tier.[100] Although many of the concerns that Falcon has raised with respect to the FCC's basic rate formula are equally applicable to the regulation of non-basic cable service tiers, substantial differences are warranted in the regulatory treatment of basic and non-basic services.

Initially, it is clear from the language of the Cable Act and its legislative history that Congress did not intend the same degree of regulatory oversight for cable service tiers as for the basic tier. While Congress provided for concurrent jurisdiction over basic cable service rates to be exercised by local, state and federal authorities, regulatory jurisdiction over non-basic service tiers is limited to the FCC. By requiring local authorities to implement local rate regulation pursuant to guidelines established by the FCC, Congress contemplated that rate regulation of basic service tiers would be the norm, and not the exception, where cable systems are not subject to effective competition. In contrast, with respect to cable services, the statute limits the FCC's regulatory authority to establishing "criteria. . . for identifying, <u>in individual cases</u>, rates for

[100]NPRM at ¶91, n.127.

cable programming services that are unreasonable."[101] Clearly, with respect to non-basic services, Congress contemplated that rate regulation would be the exception rather than the rule.

There are also significant differences in the criteria that the Commission is required to take into account in determining the reasonableness of basic and non-basic rates. With respect to basic rates, the statutory criteria relate either to the costs of providing or to revenues derived from services which are provided on the basic tier.[102] Even with respect to joint and common costs of providing cable service generally, the Commission is directed to consider only such portion of those costs as is reasonably and properly allocable to the basic service tier in deriving a formula for the regulation of basic rates.[103] In contrast, with respect to cable programming services, the Commission is directed to look beyond the costs of providing such services (although such costs are certainly to be taken into account) and to consider the rates for similarly situated cable systems offering comparable programming, the history of rates for cable programming services, and the rates, as a whole, for all cable programming and equipment and services offered on the system other than premium services.[104] In other words, this is

[101] 47 U.S.C. §543(c)(1)(A) (emphasis supplied).

[102] Id. at §§543(b)(2)(C)(ii),(iv),(vi).

[103] Id. at §§543(b)(2)(C)(iii),(v).

[104] Id. at §543(c)(2)(A),(C),(D).

basically a revenue-driven approach. Several observations flow from these differences.

First, to the extent that the Commission adopts a basic rate formula that does not allow a cable operator to recover all costs of providing such service, it must allow cable operators to recover those costs through higher rates for non-basic cable programming services. Any rate structure which does not allow cable operators to recover their full costs of providing cable service would be considered confiscatory. Inherently, in such situations non-basic rates cannot be judged by the same criteria as is applied to basic rates and cannot be limited to recovering only the actual costs of providing such non-basic services.

Second, with respect to the cable programming services, there is an even greater emphasis on allowing a greater deviation from the average within the zone of reasonableness established by the Commission as a safe harbor. Thus, while the statute requires the Commission to take into account the rates for cable systems that are subject to effective competition in establishing its basic rate formula,[105] in determining the reasonableness of non-basic rates the Commission is required to consider not only the rates for cable systems subject to effective competition but also the rates for similarly situated cable systems that are not subject to effective competition but which offer comparable programming.[106]

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[105]Id. at §543(b)(2)(C)(i).

[106]Id. at §543(c)(2)(A),(B).

Third, the statute requires the Commission to examine "the rates, as a whole, for all the cable programming, cable equipment, and cable services provided by the system" other than premium services in determining the reasonableness of an operator's non-basic rate in individual cases.[107] Thus, with respect to non-basic rates, the Commission is not required to establish a benchmark of reasonableness for each different service tier and different category of equipment as it is required to do with basic service and equipment, but only a single revenue benchmark to determine whether an operator's overall rates are reasonable for the level of service provided. Indeed, given the virtually unlimited variety in tiering and packages which might be subject to review under the non-basic benchmark and the greater flexibility given to the Commission in establishing a benchmark for the regulation of non-basic rates, the Commission's non-basic rate benchmark should use a "basket" approach taking into account the overall charge to subscribers rather than establishing different benchmarks for different tiers of service and equipment.

For example, such a "basket" approach might compare the total per subscriber service and equipment revenues received by a cable operator, perhaps on a per channel basis, and excluding revenues derived from premium services and equipment, and compare this per subscriber revenue against a per subscriber revenue benchmark of similarly situated cable systems. Such an approach

[107] Id. at §543(c)(2)(D) (emphasis supplied).

would be less burdensome on the Commission by obviating the need for separate analysis for each piece of equipment, service, and combination of service packages offered in situations where the overall rate charged by the operator is reasonable. Such an approach would also allow for greater flexibility in marketing of services and equipment which will allow cable operators to experiment with ways to most efficiently deliver video programming to subscribers.

Indeed, the Commission should be sensitive to the fact that there are a virtually unlimited variety of tiers and packages which might be subject to review under the non-basic test. Creation of a separate benchmark matrix for each possible combination of rates charged for non-basic services and equipment would be an impossible task. Even a flat per channel benchmark would not account for fundamental differences in expanded cable service tier rates. For example, special interest or "niche" tiers typically achieve a much lower penetration level than general audience tiers. Tiers with lower penetration do not produce the same level of advertising revenue for the cable network, and thus fees paid by the cable operator are inevitably higher. Thus, at a minimum, any per-channel benchmark rate adopted for non-basic tiers should be adjusted upward to reflect the actual penetration. Hence, if $1.00 per channel is reasonable for tiers achieving 100 percent penetration, the per channel rate should be, for example, $2.00 for a tier achieving 50 percent penetration. Such an approach would be more consistent with Congress' goal of fostering a choice of more alternative packages to subscribers.

As a final matter, the Commission should make absolutely clear that the packaging of services which are also offered on an unbundled basis, such as the offering of package discounts or packages of multiplexed services, does not render the package subject to rate regulation as a cable programming service. Section 623(a)(1) of the 1992 Cable Act states that:

> No Federal agency or State may regulate the rates for the provision of cable service except to the extent provided under this section and section 612 [dealing with leased access].[108]

However, the statute expressly excludes "video programming offered on a per channel or per program basis" from the definition of cable programming services which are subject to Commission oversight.[109] Where services are offered on an a la carte basis, such as premium or pay-per-view services, they do not meet the definition of a service tier since they are not sold as a group for a single price.

The same reasoning applies with equal force to package discounts. Package discounts are not the bundling of services into a tier but rather reflect non-discriminatory economic incentives. As the subscriber adds per channel or per-view services, the marginal utility for additional programming may diminish. The rate regulation provisions of the statute which expressly exempt premium services from regulation should not

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[108] Id. at §543(a)(1).

[109] Id. at §§543(1)(2) and 543(c).

prevent the cable operator from providing additional premium channels at a reduced price to subscribers in a manner which maximizes efficiency in the distribution of video programming. This holds true whether the cable operator offers a specific group of premium channels for a reduced price, whether it applies a discount for every second, third, etc. premium channel added by the subscriber or whether some other means of packaging unbundled services are employed. As long as each element of the package is available on an unbundled basis, the operator should have the total freedom to offer packages which include those services in a manner that most efficiently distributes programming to the public.

B. Procedural Issues.

Regardless of the non-basic rate formula adopted by the Commission, given the fact the statute allows a single subscriber or franchising authority to file a complaint challenging the existing non-basic rate or any future rate increase for non-basic services, the Commission must quickly serve notice to these parties that a cable operator's non-basic rates will be given a high presumption of reasonableness and that such rates will be found unreasonable in only the small minority of situations where such rates can be considered abusive. If the Commission, through delay, inadvertence or the failure to follow Congressional intent does not establish a mechanism to discourage the filing of frivolous and groundless rate complaints and for disposing quickly with such rates complaints, the Commission could find itself bogged down in individual rate hearings affecting virtually every cable system in the country. Such a result will have a chilling effect on the development of new programming services and the implementation of newly emerging technological improvements.

The complaint procedure adopted by the Commission must require more than a mere allegation "that cable rates have risen unreasonably within a given period."[110] In order for a complaint to meet the minimal showing required for Commission consideration, the complainant must be required to furnish the reasons why it believes the rates to be unreasonable. In cases where a rate exceeds the benchmark established by the FCC, the burden should then shift to the cable operator to demonstrate that its rates are reasonable despite the fact that they exceed the benchmark. On the other hand, where a cable operator's rates for non-basic service fall within the allowable safe harbor of any benchmark established by the Commission, the burden of demonstrating the unreasonableness of the rate must remain on the complainant.

The creation of a "safe harbor" pursuant to the benchmark approach for Section 623(c) is entirely consistent with the legislative history. In reconciling the House and Senate versions of legislation, the conference agreement permitted subscribers as well as franchising authorities to file complaints with respect to non-basic rates. In doing so, the conference

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[110]NPRM at ¶100.

agreement also did not include the language contained in previous drafts of the legislation requiring the complaint to demonstrate a "prima facie case" that the rate in question is unreasonable. Rather, the statute allows the FCC to establish the minimum showing that will be required in order to obtain Commission consideration of the reasonableness of the rate in question.[111] The Conference Committee Report makes clear that this change in language was intended only to make the requirements more understandable to non-lawyers.[112] There is absolutely no indication that in simplifying the process to make it accessible to consumers without the need to hire attorneys, Congress intended to shift the burden of demonstrating the reasonableness of non-basic rates to the cable operator in instances where the challenged rate is within the zone of reasonableness established by the Commission's benchmarking formula.

On the other hand, where a rate exceeds the benchmark established by the Commission, the burden should then shift to the cable operator to demonstrate that its rates are not unreasonable despite the fact that they exceed the benchmark. The benchmark approach cannot preclude a cable operator from showing that its costs justify a higher rate than specified by the benchmark. Thus, a cable operator should be entitled to demonstrate that its rates are not unreasonable through submission of such cost of service or other data as it deems

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[111]47 U.S.C. §543(c)(1)(B).

[112]Conference Report at 64.